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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Proposed Rates for Interstate Inmate Calling Services, WC Docket No. 12-375

Dear Ms. Dortch:

I¹ am pleased to submit comments to the Federal Communications Commission on its proposed regulation of interstate inmate calling services (ICS) rates. The Commission should be commended for addressing this important issue. Addressing this issue is important to ensure a well-functioning interstate telecommunications market while supporting reasonable penological goals.

As acknowledged by the Commission in the Notice of Proposed Rulemaking² (NPRM), there is “wide disparity in ICS rates between states,” and previous commenters and petitions have demonstrated that these rates can reach levels that are difficult for families of many inmates to afford. The Commission has a statutory interest in ensuring that rates for these calls are just and reasonable.³ By ensuring rates are just and reasonable, the Commission can enable more consumers to place interstate calls. Furthermore, a just and reasonable rate must ensure that ICS providers earn a fair return and are given correct incentives to provide the ICS services and invest in new ICS technology when appropriate.

Any action taken by the Commission in this market also has significant impacts on the ability of prisons to fulfill their penological objectives. In particular, rates that are set too low could force

¹ Senior Articles Editor, *Journal of Law, Economics, and Policy*; George Mason University School of Law, Juris Doctor Candidate, May 2014; Johns Hopkins University, M.A. Applied Economics, 2008; Cornell University, B.A. Economics, 2005.

² 78 Fed. Reg. 4369 (Jan. 22, 2013).

³ 47 U.S.C. § 201 (2006).

providers of these services to reduce the security services offered for the calls (such as call monitoring). On the other hand, rates that are set too high could reduce inmate contact with family members and the rest of the outside world and impede the rehabilitation process. Therefore, effective regulation in this market is essential to ensure inmates, as consumers of the call services, are charged a just and reasonable rate, while also ensuring prisons are able to achieve their goals.

The Commission has asked for comment generally on the propriety of rate regulation in the market for interstate ICS and specifically on two sets of proposed rates. One set of proposed rates, offered by a group representing current and former inmates, would cap interstate ICS rates at \$0.20 per minute for debit calls and \$0.25 for collect calls, with no per-call fee. Another proposal, offered by the providers of ICS, would cap interstate ICS rates at \$0.06 per minute and \$1.56 per call for debit calls and \$0.07 per minute and \$2.49 per call for collect calls.

I am commenting today because I recognize the importance of regulation in this market, have concerns about particular practices in the market today, and believe that a potentially elegant solution to the problem exists, which would allow the Commission to achieve its goals while avoiding the administrative burden of rate setting. This comment will first describe the market for interstate inmate calling services and argue that a natural monopoly does exist for these services, but also that rather than curing this market failure most prisons have instead created a government failure. Second, this comment will argue that the Commission has a unique role to play in solving this problem. Third, this comment will assess the costs and benefits of the two particular rate structures proposed in the NPRM. Finally, this comment will present an alternative proposal, assess costs and benefits of this alternative proposal, and argue for the attractive distributional effects of this proposal.

Under this alternative proposal, the Commission would not set ICS rates but would require prisons employ a competitive bidding process. In this bidding process, prisons would be allowed to dictate specific security services and quality levels, would not be able to earn commissions on ICS, and would be required to award an ICS contract to the vendor offering the lowest rates to the end consumer—the inmates. This proposal will allow the Commission to avoid the administrative burden of setting rates and ensuring those rates are appropriate over time. Furthermore, this proposal would ensure just and reasonable rates for consumers through the competitive bidding process. Additionally, the prison would be able to achieve its security

objectives while enabling greater inmate communication with the outside world, and thereby improved inmate rehabilitation.



Interstate inmate calling services are a natural monopoly within a prison

Rate regulation, like that proposed in the NPRM, is a reasonable regulatory action in a market that exhibits market power. Monopoly power is the purest form of market power; a single firm serves the entire market and has the power to raise price above the competitive level in order to maximize its own profit. While this monopoly price level may maximize the single firm's profits, it does not maximize overall welfare because the monopolist does not give consumers who would be willing to pay a price above marginal cost this opportunity. In such a market, rate regulation is one of the available tools that can serve the public interest by setting price at a level that ensures that all output that costs less than the regulated price is produced and sold in the market.

Rate regulation of interstate inmate calling services is appropriate because, within a prison, ICS represent a natural monopoly. A natural monopoly exists when an entire market can be served at lowest cost by a single firm.⁴ This Comment relies on the reasonable assumption that the fixed costs of installing, maintaining, and operating a prison payphone system are so high that it is irrational (and wasteful) for more than one ICS provider to serve any one prison.

Furthermore, it is reasonable for the prison to seek a single ICS provider. The prison must work closely with the ICS provider to allow access to the prison for phone installation and maintenance. The prison must also work closely with the ICS provider on security matters such as maintaining lists of approved phone numbers for each inmate and monitoring calls for suspicious activity. The prison, like any other business that grants an exclusive contract, is seeking to avoid having to duplicate all these relationship costs by working exclusively with one vendor. Therefore, it is reasonable to assume that the prison's costs associated with the ICS relationship are minimized when a single firm provides the services.

⁴ SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 13 (2d ed. 2012), *available at* http://mercatus.org/sites/default/files/RegulatoryPrimer_DudleyBrito_0.pdf

Prisons have created a government failure by seeking to profit from ICS

The fact that the market for ICS within a prison is a natural monopoly does not necessarily mean that rate regulation is required to cure the market failure and force prices for calls down to the competitive, welfare maximizing level. Competitive bidding for an exclusive contract can be an effective means to drive end consumer prices down to the competitive level without relying on a government agency to attempt to set rates at the competitive level. While only a single firm will actually win the exclusive contract to serve the market, multiple firms compete to win the exclusive contract by offering better contract terms. Absent any collusion among the competing firms, it is reasonable to assume that a firm will offer to serve the market at a price equal to marginal cost—the competitive price—rather than lose out on the opportunity to serve the market at all. A well-structured contract can ensure that the winning firm does not raise (quality adjusted) price above the competitive level after winning the contract.

While all state prisons, as well as the federal Bureau of Prisons, appear to have employed competitive bidding in awarding contracts for ICS, rather than driving prices down to the competitive level, this process has resulted in a government failure and prices that are even higher than the monopolistic firm's profit maximizing price in the absence of government activity. A government failure occurs when a government intervention into a market, instead of curing a market failure, actually results in a worse outcome—from a welfare or public interest perspective—than existed in the market before the intervention.⁵

Here, many prisons have created a government failure by the requirement of “commission” payments as part of any ICS contract.⁶ In this context, a commission is a payment made by the ICS vendor to the prison, usually as a percentage of revenue earned from inmate calls. Commission payments can be as high as 60% of revenue and are on average 40% of revenue.⁷ Instead of granting a contract that results in the lowest price for the service being contracted for (inmate calling services), the prisons are awarding contracts to ICS providers that offer the greatest commission payment.⁸

⁵ *Id.* at 18.

⁶ Paul R. Zimmerman & Susan M.V. Flaherty, *Location Monopolies and Prison Phone Rates*, 47 Q. REV. OF ECON. & FIN. 261, 262 (2007).

⁷ Todd Shields, *Prison Phones Prove Captive Market for Private Equity*, BLOOMBERG (Oct. 4, 2012), available at <http://www.bloomberg.com/news/2012-10-04/prison-phones-prove-captive-market-for-private-equity.html>.

⁸ Zimmerman & Flaherty, *supra* note 2, at 262.

This seemingly anomalous result occurs because the prisons are contracting on behalf of a captive audience, yet the prison has no duty to the prisoners to secure them the best deal possible.⁹ In fact, this practice results in quite the opposite result. Because inmates are a captive audience, they are forced to accept whatever ICS provider the prison selects and whatever rates that provider sets for interstate calls. Not only are the inmates left with no alternative ICS options, but also their demand for ICS services is very inelastic because there are no good substitutes for ICS; unlike the general public, inmates are unable to simply pick up a mobile phone that offers a competitive rate.¹⁰

In person visits can be very expensive for an inmate's family, who often must take off work, find child care, and travel long distances to visit the inmate. For the families of many inmates, this is simply infeasible. Many prisoners are transferred to prisons in other states; for example, many inmates of the Hawaiian prison system are transferred to prisons in the continental United States.

Letter writing is also a poor substitute for ICS.¹¹ Actual oral communication with the outside world, especially with family members, is enormously valuable for the rehabilitation process and provides benefits that writing cannot. Similarly, the oral communication is far more beneficial for children of the inmate than writing. Furthermore, inmates are far more likely than the general population to suffer from illiteracy, rendering letter writing nearly worthless for many inmates.

Because there are no good substitutes for ICS, inmates have a very inelastic demand for these services. Inmates, lacking other means to effectively communicate with the outside world, do not respond to large increases in ICS prices with significantly reduced consumption of these services. Therefore, ICS providers are able to pass along almost all of the cost of commissions to the inmates. Because inmates won't reduce the amount of ICS they consume in response to the price increase that commissions cause, ICS providers are able to raise prices by almost the entire amount of the commission.

The cost of commissions passed along to the inmates represents a tax on telephone calls made by these inmates. The tax is paid by the ICS provider to the government—the prison—and the rest of the price paid by the inmates covers the costs and profit due to the ICS provider. Because this tax is levied on top of the costs and profit due to the ICS provider, it is likely that inmates are

⁹ See, e.g., Maxwell Slackman, Comment, *Calling From Prison: Economic Determinants of Inmate Payphone Rates*, 10 J. L. Econ. & Pol'y (forthcoming 2013).

¹⁰ Cell Phone Contraband Act, 2010, Pub. L. No. 111-225, 124 Stat. 2387.

¹¹ Zimmerman & Flaherty, *supra* note 2, at 262.

paying higher prices for ICS than if the government hadn't sought the commission payment. Furthermore, it is likely that fewer calls are made by inmates despite their inelastic demand for these services. By increasing the price inmates pay and decreasing the quantity of calls made by inmates, governments seeking commissions have reduced welfare and creates a government failure.

Interstate inmate calling services create a positive externality for society at large

By ensuring that rates for interstate calls are just and reasonable in all markets, the Commission ensures that consumers pay competitive rates for interstate calls and that the public interest is served by maximizing welfare at this competitive price. While this result occurs in any interstate phone market that the Commission regulates, ensuring that rates in the market for interstate inmate calling services are competitive generates benefits that are external to the suppliers and consumers of these services.

Research has shown that communication with the outside world, in particular with family, is critical to the rehabilitation of inmates.¹² While the benefits of rehabilitation obviously accrue to the inmate and his family, they can take these benefits into account when deciding how many interstate calls to place. On the other hand, there are benefits of rehabilitation that accrue to the general public that the inmate and his family don't take into account when making this decision.¹³ While an inmate is incarcerated, the public is obligated to support him; the state provides his shelter, food, and all other necessities. The sooner an inmate is rehabilitated the sooner he can be released from prison, thereby reducing the public expense of supporting the inmate. Similarly, once released from prison, an inmate that has maintained contact with his family is more likely to successfully assimilate into the world outside of prison and is less likely to commit further offenses. Society as a whole benefits from having a more assimilated, law-abiding member.

When an activity creates benefits that aren't taken into the decision making process of the suppliers and demanders of that activity, as is the case here, regulation can ensure that the

¹² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-893, BUREAU OF PRISONS: IMPROVED EVALUATIONS AND INCREASED COORDINATION COULD IMPROVE CELL PHONE DETECTION at 13 (2011) [hereinafter "GAO REPORT"]; see generally Nancy G. La Vigne, Rebecca L. Naser, Lisa E. Brooks & Jennifer L. Castro, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21(4) J. CONTEMP. CRIM. JUST. 314, 316 (2005).

¹³ See Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J. L. & TECH. 159, 167 (2006).

socially optimal amount of that activity is conducted by subsidizing the cost to suppliers or consumers. By providing a subsidy to consumers of ICS, for example, the Commission could cause additional ICS services to be purchased by inmates; the subsidy could make it worthwhile for inmates to purchase ICS services that previously cost more than the inmates felt they were worth. While these marginal inmates are roughly indifferent between making these additional calls, society benefits from the greater rehabilitation of these inmates.



The Commission can and should regulate interstate inmate calling services

The Commission has statutory authority to ensure that rates for interstate communication by wire or radio are “just and reasonable.”¹⁴ Rates for ICS, which are provided via prison payphones, also must ensure that the providers of ICS are “fairly compensated.”¹⁵ However, just because the Commission has been granted authority to regulate rates for ICS does not necessarily mean that the Commission, as opposed to the states, should regulate these rates.

The state governments retain the authority to regulate intrastate local and long distance inmate calling services, so the Commission’s proposed regulation of ICS will only directly impact one type of call placed by inmates on prison payphones. Not only are the majority of inmate calls made intrastate, but calls to family members are also much more likely to be made intrastate; any regulation of interstate rates by the Commission cannot directly impact the market for these calls.

While the Commission can only ensure that interstate, as opposed to intrastate, inmate calling services rates are just and reasonable, the Commission should pursue this opportunity nonetheless. First of all, while intrastate calls may be the majority of calls placed by inmates, interstate calls to distant friends, family, or others are still an important element of inmates’ communication with the outside world. Second, it is likely that a significant reduction in interstate call rates will create downward pressure on intrastate call rates. In particular, states would find it very difficult to defend the seemingly irrational practice of charging more for intrastate calls than the Commission allows to be charged for interstate calls. If the state does attempt to maintain prices for intrastate calls at a rate higher than the Commission’s rate for interstate calls, recent technological advances allow inmates to bypass the higher intrastate for calls to family members. An inmate’s family can, at relative low cost, obtain a telephone

¹⁴ 47 U.S.C. §§ 201, 205 (2006).

¹⁵ 47 U.S.C. § 276 (2006).

number from a vendor in another state that will forward the call back to the inmate's family in their home state.¹⁶ This allows inmates and their families to take advantage of the Commission's just and reasonable rates even for intrastate, local calls.

The Commission should not set rates to subsidize ICS for inmate rehabilitation purposes

While interstate inmate calling services do create a positive externality in the form of improved inmate rehabilitation, the Commission should not regulate ICS rates in order to account for this externality. First of all, the Commission does not possess an effective tool with which to subsidize ICS. A direct cash subsidy to either inmates or ICS providers could cost the Commission millions of dollars, funds that would have to be appropriated by Congress or taken from other Commission programs. The Commission could simply set rates at a level below the competitive long run average cost level in order to ensure a greater volume of calls are purchased by inmates; however, this creates several issues. The Commission is required to ensure that ICS providers are fairly compensated, and it isn't clear how setting price below cost achieves this. ICS providers could potentially pay for this subsidy by increasing rates on intrastate calling services, but this would leave inmates paying for their own subsidy and would defeat the Commission's purpose. Alternatively, the ICS providers facing a price below cost could compensate by reducing the quality of service or investment in the network, which would result in inmates paying a quality-adjusted price no different than they would face without the Commission's "subsidized" rates.

Secondly, the Commission is likely not well equipped to determine the size of such a subsidy. While the Commission has expertise in assessing just and reasonable rates based on the cost structure of a telecommunications market, it lacks expertise in determining the socially optimal amount of interstate inmate call volume. In order to determine this, the Commission would have to determine the marginal value of increased contact with family and the outside world to the inmate rehabilitation process. Other agencies, in particular the federal Bureau of Prisons and state departments of correction are better suited to perform this calculation. More importantly, the Commission, unlike these agencies, is not tasked with achieving penological goals generally, or improving the rehabilitation process specifically. The Commission, while ensuring that rates are just and reasonable given the ICS market characteristics, should leave the achievement of penological objectives to these expert agencies.

¹⁶ Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. IN MEDIA COMM. 263, 273 (2005).



The Commission should not implement the Alternative Wright Petition proposed rates

The Commission seeks comments on the rates proposed by the Alternative Wright Petition. Petitioners, representing an inmate group, urge the Commission to adopt rates of \$0.20 per minute for debit calls and \$0.25 for collect calls, with no per-call fee. While for a fifteen minute call these per minute rates may roughly equal the rates proposed in the ICS Provider Proposal, which is based on the costs faced by the providers, this rate structure would lead to ICS providers being unfairly undercompensated for their services because this rate structure does not reflect the economic reality faced by the providers.

A bulk of the cost of each interstate inmate call is related to the initiation and billing for each call and does not increase the more minutes the call lasts; these costs are fixed for each call. Some of these costs relate to the connection of the prison phone with the out of state, terminating phone. Others relate to the recording and monitoring of each call. Other costs still relate to the billing for these calls, especially collect calls which must be collected by the ICS provider. Because all of these costs are equal whether a call lasts one minute or fifteen minutes, the proposed rate structure would undercompensate ICS providers for short calls; these calls would be subsidized by longer calls. This structure would give inmate callers an incorrect incentive to conduct more shorter, costlier telephone calls instead of more cost effective, lengthier calls because the costs are borne by the ICS vendor.

The Petitioners rightly point out that the per-call fees can quickly add up for inmates whose calls are dropped repeatedly for security reasons. An inmate can incur several per call fees for a single conversation. While inmates should be responsible for per-call fees that cover the actual, reasonable costs of connecting and billing a call, ICS providers are in a better position to minimize dropped calls and reconnection fees, and therefore any rate structure that includes a per-call fee can and should place this burden on the ICS provider—per-call fees should be capped at one per conversation.

The Commission should not implement the ICS Provider Proposal rates

The Commission seeks comments on the rates proposed by the ICS Provider Proposal. The ICS providers urge the Commission to adopt rates of \$0.06 per minute and \$1.56 per call for debit calls and \$0.07 per minute and \$2.49 per call for collect calls. While this proposal improves

upon the Alternative Wright Petition by introducing a per-call fee that accurately reflects the costs actually faced by ICS providers and would similarly reduce ICS rates to a level much more just and reasonable, the Commission should not adopt this proposal for several reasons.

Setting a rate cap to cure a monopoly pricing problem creates a risk that some prisons will not be served by the ICS market. The cost to provide ICS can vary significantly prison to prison depending on the size of the prison and the prison's security requirements. The rates proposed by the ICS providers may be sufficient to cover costs for most of the market, but it is likely that these rates are not sufficient to cover the costs of ICS at a very small prison with extremely high security requirements; this prison may not be able to obtain ICS services for its inmates at the proposed rates.

While this may not occur immediately after the rates are set by the Commission because the ICS providers likely have proposed rates that enable them to serve the entire market, this very well may not be the case in the future. As the costs of providing ICS for any prison changes in the future, the Commission would be forced to update the ICS rate cap to ensure that rates stay just and reasonable for consumers as well as fair for the providers. Specifically, if security requirements change so that the proposed rate caps are insufficient to fairly compensate ICS providers, the Commission would be forced to revisit these rates. In this way, the Commission would be left conducting periodic rate setting exercises. Whether these are formal rate setting proceedings or informal, the burden on the Commission would be significant. At the very least, the Commission would have to solicit input from ICS providers on their costs and seek public comment on new rate proposals any time ICS costs for some prisons exceed the current rate caps.

Setting rate caps for ICS would not only create an ongoing administrative burden on the Commission, but it would also not solve the monopoly pricing problem. By setting rate caps for ICS that are the same for all prisons, regardless of their size or security requirements, the Commission would be leaving the door open for lower-cost prisons to demand commission payments from the ICS provider that increase the price for ICS up to the Commission's rate cap. An ICS provider would likely be willing to serve a prison that is very large and has inexpensive security requirements at a rate below the Commission's rate cap; however, this prison would, as it would today, likely demand a commission from the ICS provider in an amount equal to the difference between the Commission's rate cap and the price the ICS provider would be willing to offer absent the commission. Therefore, the rate caps proposed by the ICS providers would not

ensure that rates charged to inmates are just and reasonable because the prisons could still push prices above cost by imposing a commission—a tax—on these calls.



The Commission should consider an alternative proposal that relies on competitive bidding

While setting a rate cap—whether proposed by the Alternative Wright Petition or the ICS providers—would result in suboptimal market outcomes and increased administrative burden for the Commission, this does not mean that the Commission should not regulate in this area. In fact, the Commission can ensure just and reasonable rates for consumers, fair compensation for ICS providers, and minimal administrative burden by imposing specific requirements on the bidding process employed by prisons to select an ICS provider. The Commission can accomplish all this while also ensuring that prisons are able to impose whatever security requirements are necessary to achieve their penological objectives.

The Commission should impose the following requirements on the ICS provider selection process: (1) ICS provider must be selected through a competitive bidding process; (2) the prison may specify any security requirements that must be met; (3) the prison may specify any quality levels that must be maintained; (4) the prison may not demand any commission payment; and (5) the winning bid must be selected based on the lowest price offered to the end consumer of the ICS services—the inmates.

This proposal is attractive for several reasons. First of all, competition among ICS providers in the bidding process will force prices for the inmates down to the just and reasonable level that also fairly compensates the ICS providers.¹⁷ No ICS provider is going to bid at a price that is below its long run average cost because at any price below that level it loses money on the contract. Furthermore, each ICS provider in this competitive bidding process has an incentive to bid at the price that equals his long run average costs. If an ICS provider attempted to bid at a price above cost, as he would do if he had already been awarded an exclusive contract, then a competing ICS provider will bid at a price below that in order to ensure he wins the contract. This pricing decision-making will occur for each ICS provider until all bid at the lowest possible price they can afford, and the contract will be awarded to the lowest cost, lowest bid ICS

¹⁷ See generally, Oliver E. Williamson, *Franchise Bidding for Natural Monopolies-in General and with Respect to CATV*, 7 BELL J. ECON. 73 (1978).

provider. Because the contract requires the ICS provider to commit to a specific ICS rate, that provider is therefore committed to offering a just and reasonable rate to the inmate consumers.

Second, this proposal allows the prison to retain control over the quality of ICS services and the security provided for these services. By allowing the prison to dictate quality levels, the incentive created by the exclusive, fixed price contract to reduce quality is reduced. Specifically, after being awarded the ICS contract that specifies exactly which price ICS is to be provided at, the provider has an incentive to reduce the quality of his service in order to reduce costs and increase profit. Because inmates have no close substitutes for this service, they are left paying a quality-adjusted rate that is above cost; this rate would no longer be just and reasonable given the quality level. Relatedly, allowing the prison to dictate security requirements for ICS. If, based on its own penological policy and objectives, the prison determines that a certain level of security (or quality) is optimal, this proposal would not stand in the way of the prison setting such requirements in the bidding process. This allows the prison to retain the ability to set penological policy rather than the Commission.

Third, this proposal will ensure that the government failure created by commission payments is eliminated. Forcing prisons to select the ICS provider who has the lowest costs and can provide ICS services at the lowest price does not ensure that inmates will face just and reasonable rates for these services because prisons frequently require a commission payment for each call. As described above, ICS providers pass this cost along to inmates while the prison captures a rent. This higher price leads to fewer inmate calls being placed than is socially optimal. By outlawing these commission payments, the Commission would ensure that inmates are charged the competitive, just, and reasonable rate that maximizes welfare and best serves the public interest.

While this proposal does have several attractive qualities, it does come with one significant cost. While the commission payments demanded by many prisons do create a government failure in the market for ICS, the funds generated by these payments frequently are put to very productive use. For example, several states use commission payments to fund services for victims of crime. Many prisons use the payments to fund inmate services such as reading or employment programs.¹⁸ Some states even pass the commission payments along to the state's general fund. While eliminating commission payments would eliminate the funding for these various programs, the Commission should still eliminate the payment of commissions from the ICS market. If these programs are valuable to the prisons or states that provide them, then they are

¹⁸ See, e.g., GAO REPORT, *supra* note 12 at 17, table 2.

certainly capable of funding these programs through the general appropriations process instead of through a tax on interstate inmate calling services.

This competitive bidding proposal corrects an unjust regressive tax on inmates' families

Not only are states capable of making up for lost commission funding through appropriations, this is in fact the correct policy outcome. ICS commission payments are a tax on the inmates and their families that must pay for these calls. These consumers are significantly more likely to earn lower-class incomes or live in poverty; a tax on these consumers is plainly a regressive tax. While tax codes are usually structured to distribute wealth from the highest income groups to the lowest income, the commission payments are a tax on the lowest income groups in our society. When these payments are used to fund the state general fund, the tax is plainly a redistribution from the poorest to the wealthiest since not all of the state general fund is distributed back to the poor.

Even if the commission payments are used to fund other inmate activities, this is still not a sound policy. The responsibility for funding prisons and the rehabilitative process should not fall on the families of the incarcerated; it is society's duty to share in these costs. By using commission payments to fund the rehabilitative process, this policy is turned on its head. Furthermore, forcing the families of inmates to pay for inmate services and amenities through commissions may not serve the penological objectives of the prison. In particular, it is not clear why imposing a tax on inmates' families through a commission on ICS and then redistributing that tax to the inmate as a payment for prison labor is anything more than a wasteful, circular process.

While the states would be capable of funding these programs, if they are indeed valuable, through the appropriations process, the reality is that most lack the political will to do so. Taxing the general public to fund inmate services is not likely to be a popular political strategy. On the other hand, taxing the families of inmates carries almost no political risk; these families are not politically sympathetic and also lack the financial resources to effectively influence the political process. It is for these same reasons that effective regulation of interstate inmate calling services has taken so long to arrive.

The Commission has authority to implement this competitive bidding proposal

While the Commission has set out to regulate interstate ICS rates by setting rate caps, the Commission's statutory authority is not limited to this one form of regulation. First of all, the

Commission's authority to regulate the rates charged by common carriers along interstate wire and radio is not limited simply to the setting of specific rates. The Commission's authority is to ensure that all such charges are "just and reasonable";¹⁹ the proposed competitive bidding plan would result in just and reasonable interstate ICS rates. The Commission's enforcement power, however, includes not only the setting of rates but also includes the power to determine "what classification, regulation, or practice is or will be just, fair, and reasonable."²⁰

Similarly, the competitive bidding proposal is within the Commission's authority to regulate payphone services. The Commission is empowered to "establish as per call compensation plan to ensure that all payphone service providers are fairly compensated."²¹ While the most obvious "plan" to achieve this would be a set of rate caps, this language does not require the Commission employ a set of rate caps. Instead, the Commission is granted the authority to promulgate any "plan" that would ensure fair compensation to the providers of interstate ICS. If Congress has intended the word "plan" to be restricted to rates or charges, it would have used language to accomplish just this, as it has elsewhere in Title 47.²²



I appreciate the opportunity to comment on the Commission's proposed rates for interstate inmate calling services. I would welcome the opportunity to further discuss my comments with you. If you would like to discuss these comments, please do not hesitate to call me at 703-581-3819.

Sincerely,

Michael Rogers

¹⁹ 47 U.S.C. § 201(b) (2006).

²⁰ 47 U.S.C. § 205(a) (2006).

²¹ 47 U.S.C. § 276(b)(1)(A) (2006).

²² *See, e.g.*, 47 U.S.C. § 205(a) (2006) ("[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge.").